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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	**GN Docket No. 00-185**
	)	

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AT&T Corp. ("AT&T") respectfully submits these comments in response to the Commission's Notice Of Inquiry ("NOI").[1]

INTRODUCTION AND SUMMARY

This proceeding represents the fifth time in two years that the Commission has investigated the questions of whether or how it should regulate cable operators that offer "cable modem services" (or "cable Internet services"). These services were developed by cable operators to provide "broadband" alternatives to the online and Internet access services that had been (and still are) overwhelmingly provided by AOL and other firms over ordinary, "narrowband" telephone lines.

In the Commission's four prior orders, it determined that the best way to promote the widest availability of broadband and other Internet access services at the lowest possible cost is a policy of "vigilant restraint" that relies on marketplace forces, rather than on regulatory requirements. In particular, the Commission rejected the proposals of incumbent Local Exchange Carriers ("LECs") and others to impose so-called "open access" requirements that would force cable operators to reconfigure their systems and services and act like common

[1] *Notice of Inquiry*, Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities, FCC 00-355 (rel. Sept. 28, 2000), ¶¶ 14-24 (hereinafter "NOI").

carrier telephone companies by providing last mile transport to any requesting Internet Service Provider ("ISP") under regulatorily-prescribed terms and conditions.

In refusing to adopt these forced access requirements, the Commission recognized that the provision of broadband services was in its nascency and that access regulation would produce no public benefits but could only substantially harm the interests of consumers and the public generally. The Commission found that there was no likelihood that cable operators could acquire market power over the provision of high speed or other Internet access services. Even apart from the competition provided by the embedded and growing base of narrowband services, the Commission determined that local telephone companies, wireless carriers, satellite carriers, and others were already offering competing broadband services, and that this intense and growing intermodal competition would powerfully reinforce the cable operators' incentives to provide access to web sites, portals, and online and Internet service providers in the ways that are most efficient and that provide the greatest value for consumers. Competition and marketplace forces will quite simply yield procompetitive and pro-consumer outcomes far more effectively than could any regulatory requirements.

Not only is regulation unnecessary, but, as the Commission recognized, it would impose immense costs and would burden and possibly jeopardize the ability of cable operators to provide their alternatives to the Internet access services that are available over other networks. In this regard, the Commission noted the significant evidence that cable systems currently cannot provide direct connections for multiple ISPs and that implementing a regime of "open access" presented numerous complex technical and operational issues. In addition, because the introduction of cable Internet services had caused telephone companies and others rapidly to accelerate their deployment of competitive DSL and other alternatives, the Commission recognized that imposition of regulatory requirements that slowed the deployment of cable

modem services would also slow the deployment of broadband alternatives and, thus, harm consumers both directly and indirectly.

Intervening events have dramatically confirmed the wisdom of the Commission's deregulatory policies in this area. Specifically, while there has been slow and steady growth in subscription to cable Internet services, there has been a literal explosion in the deployment and use of DSL and other broadband alternatives to cable systems. In turn, cable operators have responded to this competition and to consumer demand for still easier methods of reaching other ISPs over cable. The two largest cable operators, AT&T and Time Warner, have committed to provide direct access to other ISPs and have begun conducting extensive technical and other trials to develop and determine the feasibility of alternative methods of providing this access. In particular, AT&T recently unveiled "Broadband Choice," a program designed to develop, test, and deploy new technology and processes that will permit customers to purchase services from multiple ISPs that are connected directly to AT&T's cable systems. AT&T is currently conducting a trial in Boulder, Colorado, in order to work out necessary technical and operational arrangements and will shortly commence a second, broader trial in Massachusetts.

Other events have similarly confirmed that enormous burdens would be the inevitable consequence of any efforts to rely on regulation to develop "one size fits all" cable access arrangements for ISPs. For example, although Canada attempted to require "open access" more than four years ago, its efforts to prescribe access terms and conditions have been mired in complex proceedings, and despite four years of efforts, Canada is no closer than is the United States to the development of the arrangements required for customers directly to access multiple ISPs over cable systems.

Because these interim developments all confirm the correctness of the Commission's prior findings, predictions, and deregulatory policies, there are no facts or marketplace

conditions that could conceivably justify a change in policy. However, as the NOI explains, there have been other intervening developments that make the present inquiry a very appropriate one.

In particular, there are a number of recent judicial decisions addressing (often in dicta) the appropriate legal and regulatory classifications of cable Internet services. Although the judgments of the courts are all consistent, their statements about the proper regulatory definition of cable Internet services conflict and would have very different implications for the rights and duties of cable operators. These conflicts create the potential for confusion that could itself burden cable operators and their ability efficiently and effectively to offer cable Internet services. For example, one court held that cable modem services are not only "information services" but also fall squarely within the Communications Act's definition of the "cable services" that Congress immunized from regulatory unbundling and access requirements in §§ 621(c) and 624(f) of the Communications Act. A second court held that the services are neither "telecommunications services" nor "cable services" but are "information services." Finally, a third court stated (in dictum) that cable modem services are not "cable services" but that cable operators which offer them are inherently providing "telecommunications services" – such that the Commission could subject cable operators to the common carrier obligations under Title II of the Communications Act. The latter suggestion has led numerous ISPs to demand interconnection and to threaten litigation that could burden cable operators and their cable Internet services. There is thus an obvious public interest in having this Commission develop a record on the nature of cable modem services in order to determine the appropriate regulatory and legal classification for them and to reassess the appropriate regulatory requirements, if any, that can or should apply to providers of these services.

AT&T's comments address these issues in five parts. Part I addresses the question of the proper regulatory and legal classification of both existing cable Internet services and the access to the "cable modem platform" that cable operators are developing and testing. Part I demonstrates that because cable modem services make available information to subscribers generally over the same specialized telecommunications facilities that provide video programming, cable Internet services are the "cable services" that Congress categorically exempted from federal, state, and local access and unbundling requirements in §§ 621(c) and 624(f) of the Communications Act. Further, because they make available "information via telecommunications," cable Internet services are also "information services." Because cable operators have no bottleneck power, these information services are exempt from access and unbundling requirements under the Commission's *Computer III* rules. Finally, because cable Internet services are plainly information services, they emphatically are not "telecommunications services" and are not subject to Title II common carrier regulations.

Part II discusses the existing and emerging competitive market conditions for the provision of online and other Internet access services. It demonstrates in detail that intervening developments have dramatically confirmed the predictions that the Commission made in its prior four orders. In particular, while cable Internet services have grown steadily, the vast bulk of consumers continue to use narrowband telephone lines for online services. Beyond that, the broadband offerings by cable operators have spurred local telephone monopolies to make multi-billion dollar investments in the provision of DSL and to accelerate the deployment of DSL services. DSL is now growing at a rate some three times faster than cable Internet service, and it is widely predicted that, in the near future, more consumers will obtain broadband Internet access over DSL than over cable Internet services. Nor is DSL the only alternative to cable Internet services. Satellite providers have launched their own broadband Internet access services

nationwide, and wireless carriers have made massive investments in their own alternatives and are introducing them throughout the nation.

This competition obviously provides cable operators with overwhelming incentives to ensure that their cable Internet services meet the needs of consumers and allow them to reach online content and services efficiently. That these potent incentives exist is confirmed by the efforts of cable operators to give their consumers the ability to obtain direct access multiple ISPs. Part II highlights the complex technical and operational problems associated with multiple ISP access, but also notes that efforts to meet these challenges are underway. Part II demonstrates that cable operators have announced that they are testing and will enter into arrangements that will allow multiple ISPs to reach customers directly over cable systems.

Part III addresses the enormous harms to consumers that would result from any regulatory attempts to prescribe the terms under which multiple ISPs may directly access customers over cable systems. It explains how the technical and operational challenges that the provision of this access presents can be solved efficiently and effectively through individual, negotiated arrangements that reflect the particular needs of individual ISPs and cable operators. By contrast, as the Canadian experience confirms, attempts to develop "one size fits all" regulatory solutions would impose enormous costs and likely prove ineffective. Part III similarly explains how the imposition of regulatory forced access requirements would profoundly impede innovation by cable operators and their competitors alike.

Part IV demonstrates that the claim that cable operators should be subject to forced access requirements in order to create "regulatory parity" between cable operators and LECs is patently false. Cable systems are fundamentally different from monopoly local exchange networks both in terms of their technical capacity to accommodate multiple ISPs and their positions in the marketplace. That is why Congress imposed such fundamentally different

regulatory schemes on the different entities. Abstract notions of "regulatory parity" cannot justify imposing inappropriate and harmful regulations on cable operators that will ultimately slow the deployment of services to consumers. Nor can they justify abandoning the fundamental national policies of fostering competition in local telephone markets, accelerating the deployment of new technologies, and developing new competitively neutral means of funding universal service.

Finally, Part V addresses the questions that the NOI raises about interactive TV. It is premature to consider regulating interactive TV because it is in the earliest stage of its development. Moreover, regulation is further unnecessary because many companies are rapidly entering the business. In all events, because this proceeding addresses entirely separate and unrelated issues, it would be inappropriate to consider proposing or adopting regulations on interactive TV in this docket.

I. EXISTING CABLE INTERNET SERVICES ARE BOTH "INFORMATION SERVICES," AND "CABLE SERVICES," BUT NOT "TELECOMMUNCATIONS SERVICES."

In the NOI, the Commission sought comment on the proper classifications both of existing "cable modem services" that cable operators offer to their customers and of the access to the "cable modem platform" that cable operators plan to provide to ISPs in the future. These two questions implicate rather different issues.

First, the question of the appropriate regulatory classification for today's "cable modem services" arises because of the recent federal court opinions that have invalidated local forced access ordinances. The decisions classified cable Internet services in conflicting ways that could have very different implications for the rights and duties of cable operators. One court held that

the services are not only "information services," but also are "cable services."[2] Another court held that cable Internet services are "information services," but are neither "cable services" nor "telecommunications services."[3] Finally, a third court suggested (in dictum) that cable operators that offer cable Internet services are providing "telecommunications services" – such that the Commission could subject cable operators to the common carrier obligations of Title II of the Communications Act.[4] However, courts made these divergent suggestions notwithstanding that the issue of the proper classification of cable Internet services was not directly raised and that there was no factual record regarding the precise nature of these services.

Once the facts of the services are understood, their classification is a straightforward matter under the Communications Act and the Commission's precedent. As explained in detail below, cable modem services are provided by cable operators to their subscribers over the same specialized telecommunications facilities that transmit video programming. Cable modem services thus fall squarely within the Communications Act's definition of the "cable services" that Congress has immunized from regulatory unbundling and access requirements in §§ 621(c) and 624(f) of the Communications Act.[5] In any event, because they deliver "information via telecommunications," cable modem services are unquestionably "information services." As such, they are immune from unbundling and access obligations under the Commission's

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[2] *See MediaOne Group* v. *County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va.), *appeals docketed*, Nos. 00-1680, 00-1709, 00-1719 (4th Cir. 2000).

[3] *See Gulf Power Co.* v. *FCC*, 208 F.3d 1263, 1276-77 (11th Cir.), *reh'g en banc denied*, 226 F.3d 1220 (11th Cir.), *petition for cert. filed* (U.S. Nov. 22, 2000) (No. 00-832).

[4] *See AT&T Corp.* v. *City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

[5] 47 U.S.C. §§ 541(c), 544(f).

Computer III rules[6], particularly because cable operators do not control bottleneck facilities for the provision of Internet access services. In both these regards, the fact that cable Internet services *use* telecommunications to deliver information does not permit the services to be classified as "telecommunications services." Nor is there any reason or basis for the Commission to develop a new and separate regulatory classification which would apply to cable Internet services.

Second, whereas the determination of the proper regulatory classification of today's "cable modem services" is an easy matter, that is not the case with the future services that will be offered when cable operators provide customers with direct access to multiple ISPs. Indeed, it is not possible to answer this question today. The reason is that there are multiple alternative methods of providing such access. These are only now being explored through technical trials and commercial negotiations. As discussed below, how future services, including access to a cable modem platform, will be classified will depend on whether these services include information chosen by the cable operators – in which case, they will be information services – or whether, conversely, they provide a pure transmission service, either on a private carriage or a common carriage basis.

A. Today's Cable Internet Services Provide Information To Cable Subscribers Generally Over The Same Specialized Telecommunications Transmission Facilities That Deliver Video Programming.

The determination of the proper legal classification of today's cable Internet services obviously depends on the factual characteristics of these services. The NOI thus appropriately "seek[s] to develop a factual record regarding the services provided by cable operators."[7] The

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[6] *See Amendment of § 64.702 of the Commission's Rules and Regulations*, 104 F.C.C.2d 958 (June 16, 1986), *rev'd on other grounds by California* v. *FCC*, 905 F.2d 1217, 1238-39 (9th Cir. 1990).

[7] NOI ¶ 14.

three essential characteristics of today's cable Internet services can be summarized relatively briefly.

First, cable operators provide cable Internet services over the same network of optical fiber, coaxial cable, and related transmission facilities that they use to deliver video programming. These are specialized telecommunications facilities that are configured to engage in the simultaneous one-way "downstream" broadcast of multiple television channels from central cable facilities ("headends") to all the homes and businesses in the service area. Beginning in the 1960s, cable television operators added limited "upstream" transmission capacity to these facilities, and these upgrades initially allowed cable systems to offer "pay per view" and other related services. The offering of cable modem services required cable operators to upgrade their facilities still further and to dedicate one or more of their downstream channels and some of their limited upstream capacity to this cable modem service. These upgrades included installing Cable Modem Terminating Systems and specialized equipment in cable headends in order to allow communications over the cable network to and from personal computers or other terminals that are equipped with cable modems. This specialized equipment and the associated upstream and downstream transmission facilities are sometimes referred to as the "cable modem platform."

Second, the essence of today's cable modem services is to make available generally to all customers a particular kind of information: information that is stored in centrally located or remote computers and that customers can access and interact with through the cable Internet service. This information falls into several broad categories.

Substantial amounts of information are chosen and packaged by the cable operator or its programming suppliers. For example, AT&T's cable systems purchase cable modem services at wholesale from either Excite@Home or ServiceCo and offer the services at retail under the

tradenames AT&T@Home or AT&T-Road Runner. These services include vast amounts of national news, sports, and other distinctive content that has been produced by or purchased for these services by Excite@Home or ServiceCo. In addition, AT&T itself produces or obtains distinctive local content. All of this information is stored in national or regional computers, and the information is made available as part of the "home page" or other "screens" of the AT&T@Home or AT&T-Road Runner services. These screens also include "links" or "buttons" that allow customers directly to access particular third party web sites chosen by AT&T or its suppliers by clicking on the link or button.

The @Home and Road Runner services also have features that allow customers to access web sites on the public Internet. That is so because Excite@Home and ServiceCo have their own Internet backbones and have entered into peering and the other necessary commercial arrangements to allow AT&T's customers to reach sites served by other Internet backbone providers. In the case of frequently visited web sites, Excite@Home and ServiceCo periodically download the contents of the web sites and store the information in their own computers. This "caching" serves a number of functions, including making the information available to viewers with less delay than would otherwise occur.

In addition to the information that is made available generally to subscribers, the AT&T offerings have incidental features. Most prominently, they allow subscribers to use the service to send and retrieve electronic mail.

Whether the service is @Home or HBO, the cable operator makes an editorial decision to obtain the service and to offer it to subscribers over its cable transmission facilities as one component of the cable operator's product line. Indeed, when a cable operator decides to offer a cable modem service, it is determining to use bandwidth for that purpose rather than to offer additional sports, movies, or other video programming. Accordingly, the courts have recognized

that the offering of cable modem services implicates the core First Amendment rights of cable operators to the same extent as does the offering of video programming.[8]

B. Today's Cable Internet Services Are "Cable Services."

The cable Internet services offered to subscribers by AT&T and other cable operators today "fall[] under the statutory definition of 'cable service.'"[9] The Communications Act[10] defines "cable service" as "(A) the one way transmission to subscribers of (i) video programming *or* (ii) other programming services and (B) subscriber interaction, if any, which is required for the selection or use of such video or other programming service."[11] "Video programming" is defined as movies, sporting events, and the other types of programs that are offered by or generally considered comparable to local over-the-air TV broadcasting channels.[12] The term "other programming service" is defined to "mean[] information that a cable operator makes available to all subscribers generally."[13]

The NOI seeks comment on whether the 1996 amendment to the statutory definition – the addition of the words "or use" to § 522(6) – has "change[d]" or "expanded" the definition so that it now includes cable modem services.[14] The NOI thus appears to assume that the statutory definition did not include cable modem services prior to 1996. The plain language of the pre-1996 statutory definition, as well as the pre-1996 legislative history, show that cable modem services would have been "cable services" even if the 1996 amendment had never been enacted.

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[8] *See Comcast Cablevision of Broward County* v. *Broward County*, No. 99-6934-CIV, slip op. at 11, 16 (S.D. Fla. Nov. 8, 2000).

[9] *County of Henrico*, 97 F. Supp. 2d at 715.

[10] Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, *et seq.* ("Communications Act").

[11] 47 U.S.C. § 522(6).

[12] 47 U.S.C. § 522(20).

[13] 47 U.S.C. § 522(14).

[14] NOI ¶ 16.

Because cable Internet services "make[] available to subscribers generally" local and national news and other "information" that subscribers both "select" (by clicking on an icon) *and* "use" (through further interactions), those services are "cable services" within the meaning of both the version of the Communications Act that was in effect prior to 1996 and the Act as written today.

In this regard, the congressional committee that drafted the Cable Act of 1984[15] emphasized that the definition of "other programming services" applies to online computer services that provide information that is "available to all [subscribers] generally."[16] It listed news as an example of generally available information and stated that if a service offers "news," it provides cable service.[17] It further stated that if information can be accessed by all subscribers – and not merely "specific subscribers" or discrete groups of subscribers – it is "available" to them and meets the definition of "other programming services" even if the information is of "interest" to and seen by only "particular subscribers."[18] In a similar vein, the Report recognizes that cable operators rarely "create" the information that they provide, but generally "obtain" rights of access to information by entering into contracts with third parties. The Report states that the definition of cable services was not intended to "restrict the manner in which cable operators may obtain the information provided as a cable service."[19]

The 1996 amendment to the Communications Act[20] expanded the definition of cable services. As broadened, the definition includes instances in which the "subscriber interaction" with the information is for the "use" of the information rather than its "selection" (such as the

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[15] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. ("Cable Act of 1984").

[16] H.R. Rep. 98-934, at 41 (1984).

[17] *Id.* at 44.

[18] *Id.* at 42.

[19] *Id.* at 41.

[20] Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996).

playing of a computer game rather than the choosing of which game to play). The Conference Report stated that the intent of the amendment is "to reflect the evolution of cable to include interactive services such as game channels and information services, as well as enhanced services."[21]

Under either the current or the prior statutory definition, therefore, cable Internet services are cable services. AT&T's cable Internet services make available generally to AT&T's subscribers at least five separate broad classes of news and similar information and allow subscribers to select, view, download, and otherwise use the specific information that interests them. Indeed, while each of these five categories of information constitute an "other programming service" and thus a "cable service" within the statutory definitions, cable modem services must be classified as "cable services" so long as any one of the categories satisfies these definitions.

The first type of information that AT&T "makes available generally" to all subscribers is the distinctive local content that it produces or otherwise obtains and then adds to the @Home and Road Runner services that it obtains from Excite@Home and ServiceCo. Subscribers either view this information on the "home page" of the AT&T service or select it by clicking on icons on the home page or subsequent screens of the service.

The second is the national news, sports, entertainment, and other information that Excite@Home and ServiceCo produce or obtain rights to use and include in the service which they sell (at wholesale) and which AT&T and other cable operators offer at retail. This information, too, is either viewed by subscribers on the "home page" of the cable modem service or selected by clicking on icons.

[21] H.R. Rep. 104-458 at 169 (1996).

The third is the contents of web sites that subscribers access through the "links" that are features of the AT&T@Home and AT&T-Road Runner Services. These links exist because Excite@Home and ServiceCo have entered into commercial or other arrangements to allow the associated web sites or portals to be featured in the @Home or Road Runner service. Because Excite@Home and ServiceCo installed the links to information that was contained in these web sites and because AT&T is offering their @Home and Road Runner wholesale services at retail, AT&T has made this information available to its subscribers.

Fourth, whether or not there are "links" to them, Excite@Home and ServiceCo periodically download the contents of frequently visited web sites and store the information in their own computers. Under these "caching" arrangements, when subscribers want to visit the web site in question, they are actually accessing information stored in Excite@Home and ServiceCo's own computers and "made available" by the AT&T service.

Finally, as explained above, AT&T has also "made available" to subscribers information that is obtained from the public Internet and that is not "cached." For the reasons set forth in the margin, the right to view and interact with this information, too, has effectively been purchased by Excite@Home and ServiceCo and included in the cable Internet services that AT&T offers

generally to its customers; AT&T thereby has "made available" this information to subscribers generally.[22]

As the Notice observes,[23] the Ninth and Eleventh Circuits have nonetheless each stated that at least some forms of Internet access services provided over cable systems are not "cable services."[24] In neither case, however, was this definitional issue subject to adversarial briefing, and there was no factual record of the precise nature of the cable Internet services that AT&T and others offer.

In *City of Portland*, both the appellant (AT&T) and the appellee (Portland) *agreed* in the trial court and in the court of appeals that AT&T's cable modem service was a "cable service."[25] There thus was no factual development on this issue, and neither AT&T nor Portland briefed the question or provided an extended defense of that proposition. And in *Gulf Power*, although the court erroneously suggested that the "FCC argue[d] that Internet service provided by a cable television system is . . . 'solely cable services,'"[26] the Commission in fact stated to the contrary

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[22] The Internet and contents of the web sites and portals that are connected to it are not free goods. The Internet is a series of interconnected data networks and web sites that are connected to one another by "Internet backbone facilities." Providers of Internet access services thus must enter into commercial arrangements in which they pay for the right to connect to Internet backbone facilities that, in turn, provide connections to web sites on the Internet. The payments can be in cash but can also take the form of agreeing to exchange traffic with the Internet backbone provider on reciprocal terms (known as peering arrangements). But regardless of the precise nature of the arrangement, AT&T has "made available" to each subscriber the contents of the public Internet. AT&T did so by purchasing the @Home and Road Runner services from Excite@Home and ServiceCo, which in turn have entered into commercial arrangements with Internet backbone providers that make available all the information on the public Internet. Thus, the provision of these Internet access features, too, is the provision of "other programming services" and is thus a "cable service" under § 522(6)(A)(ii) of the Act.

[23] NOI ¶¶ 2, 13.

[24] *See City of Portland*, 216 F.3d at 877; *Gulf Power*, 208 F.3d at 1275-78.

[25] *City of Portland*, 216 F.3d at 876 ("Portland premised its open access condition on the position that @Home is a 'cable service' governed by the franchise").

[26] *Gulf Power*, 208 F.3d at 1276.

that it "need not decide at this time . . . the precise category into which Internet services fit."[27] These courts therefore did not have the benefit of the factual and legal submissions that are now before the Commission in this proceeding.

Thus, for example, in the absence of a record on the issue, the Eleventh Circuit addressed pure "Internet service" only,[28] not the services that AT&T and other cable operators actually provide – which include substantial proprietary content in addition to Internet connectivity. Moreover, the Eleventh Circuit's discussion simply assumed that the definition of "cable service" prior to 1996 did not include cable modem services. As a result, the only question it addressed was whether the 1996 amendment had the effect of altering the definition so as to include such services for the first time – and it concluded that the amendment did not do so because it was too "minor [a] change to effectuate a major statutory shift."[29] Because, as shown above, cable modem services fit easily within the pre-1996 definition of "cable service," the Eleventh Circuit's analysis does not begin to resolve the statutory question on which the Commission has here sought comment.[30] In all events, on November 22, 2000, the Commission filed a petition for certiorari with the United States Supreme Court in this case, and, if that

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[27] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777, 6795 (1998).

[28] *Gulf Power*, 208 F.3d at 1276.

[29] *Id.*

[30] The Eleventh Circuit also stated that even the addition of the words "or use" in 1996 did not sweep in Internet access services, concluding instead that Congress merely "expanded the definition to include services that cable television companies offer to their customers to allow them to interact with traditional video programming." *Id.* at 1277. In addition to contradicting the legislative history, this explanation makes no sense because it would render the "or use" language superfluous. The Eleventh Circuit did not and could not identify any means by which subscribers "interact with traditional video programming" through the "use" of such programming that do not involve "selection."

petition is granted and the Eleventh Circuit's decision is reversed on the ground sought by the Commission, the portion of the opinion addressing this definitional issue will be vacated.[31]

The Ninth Circuit's cursory analysis suffered from different, but equally fatal, flaws. Relying on the Communication Act's various "must carry" and PEG obligations, the Ninth Circuit concluded that "applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results."[32] However, the court's analysis is misguided. Sections 531, 532, and 534 of the Communications Act[33] impose obligations on a cable operators' "channel capacity," not on video programming or other programming. Thus a cable operator's provision of Internet services would not affect its compliance with sections 531, 532 and 534 because those obligations depend on the operator's channel capacity, not the type of service it provides. Moreover, that Congress imposed special obligations that affect only cable operators' channel capacity hardly alters the fact that Congress expressly defined "cable services" to include "other programming services" as well as "video programming." It is similarly irrelevant that, as the Ninth Circuit observed, "surfing" television channels is a

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[31] *See Gulf Power Co.* v. *FCC, petition for certiorari filed sub nom. FCC* v. *Gulf Power Co.* (U.S. Nov. 2000). The Commission has not asked the Supreme Court to address the definitional issue, but rather to reverse the Eleventh Circuit's predicate holding that the Commission has jurisdiction to regulate the rates only of pole attachments that are used to provide "solely cable services" or "telecommunications services." 208 F.3d at 1276. If the Supreme Court does so, there will be no reason in that case to address whether Internet access can be a "cable service."

[32] *City of Portland*, 216 F.3d at 877.

[33] 47 U.S.C. §§ 532, 534.

different experience from using an online service on a personal computer.[34] By defining "cable services" to include "other programming services," Congress defined the services to include online computer services offered over cable systems in addition to the television programs that constitute "video programming."

The Ninth Circuit also appeared influenced by the fact that cable Internet services generally include "e-mail" and other types of services that do not themselves constitute "other programming services."[35] But for purpose of deciding whether particular cable Internet services are "cable services" under the Communications Act's definition, it is irrelevant that @Home and Road Runner offer e-mail, transactional services, and other individual features that are not themselves cable services. Virtually all cable services have incidental or other features that are not cable services in their own right, and the decisive issue under the Communications Act is not whether a service includes such features. Rather, the relevant question is whether the service offers the "video programming" or "other programming services" that satisfy the definition of cable services. If it does, it is unequivocally a "cable service."

This point is made explicit in the 1984 congressional report. It notes that many "commercial information services today offer a package of services, some of which would be cable services and some of which would not be cable services."[36] It then explained that the manner in which "a cable service is marketed would not alter its status as a cable service" and that the inclusion of non-cable service such as e-mail in the package "would not transform" the news or other "cable service into a non-cable communications service."[37]

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[34] *City of Portland*, 216 F.3d at 877.

[35] *Id.* at 876.

[36] H.R. Rep. No. 98-934, at 44 (1984).

[37] *Id.*

C. Today's Cable Internet Services Are Also "Information Services."

Cable Internet services are "information services" as well as "cable services." The Communications Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[38] Applying this definition, the Commission has properly held that Internet access services – which patently offer capabilities to acquire, use, process, store, transform, generate and retrieve information – are information services when provided over telecommunications facilities.[39]

That conclusion is dispositive of the classification of cable modem services.[40] The Commission has properly recognized that a cable operator's wires and associated facilities are "telecommunications facilities" insofar as they are used to provide transmission. That is because, the Commission explained, "transmission capability" and "'telecommunications' capability" are synonymous.[41] The Commission has thus agreed with that portion of the Ninth Circuit's decision in *Portland* that correctly found that the cable facilities that transmit @Home and Road Runner are performing "telecommunications" (while disassociating itself from the Ninth Circuit's "unnecessary extra step" of concluding in *dictum* that cable providers are

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[38] 47 U.S.C. § 153(20).

[39] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 401 (1999); Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11536 (1998) ("*Report to Congress*").

[40] Cable Internet services would be information services even if they were *not* cable services – as two courts of appeals have held. *See City of Portland*, 216 F.3d at 877-878 (holding that cable modem services are information services but not cable services); *Gulf Power*, 208 F.3d at 1277 (same).

[41] *See* Amicus Curiae Brief of the Federal Communications Commission at 20, *MediaOne Group* v. *County of Henrico*, No. 00-1680(L) (4th Cir. filed Aug. 9, 2000), at 20 ("FCC Amicus Brief"); *see also* 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

therefore providing a "telecommunications *service*" to their subscribers).[42] Indeed, that was the basis of the Commission's conclusion that Henrico County's open access ordinance violates 47 U.S.C. § 541(b)(3)(D), which prohibits localities from conditioning approval of license transfers on the cable operator's willingness to provide telecommunications services or facilities to third parties, because open access regulations would require cable operators to provide their "telecommunications facilities" to third party ISPs.[43]

D. Although Existing Cable Internet Services, Like All Information Services, Are Provided "Via Telecommunications," They Are Not Telecommunications Services And Are Not Subject To Title II Regulation Merely Because They Use A Telecommunications Component.

The cable Internet services provided to subscribers are not telecommunications services for the same reason that they *are* information services: they transmit information chosen by the cable operator.[44] "Telecommunications" is "the transmission, between or among points specified by the user, of information of the *user's* choosing, without change in the form or content of the information as sent and received."[45] "Telecommunications services" are "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used."[46] As the Commission and the courts have long recognized, "telecommunications services" provide customers with a pure

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[42] FCC Amicus Brief at 20 (emphasis added).

[43] *See id.*

[44] *See supra.*

[45] 47 U.S.C. § 153(43) (emphasis added).

[46] 47 U.S.C. § 153(46).

transmission conduit without *any* accompanying information.[47] Because cable Internet services undeniably include information, they simply cannot be telecommunications services.[48]

Proponents of access regulation claim that the Ninth Circuit held to the contrary. In fact, the only issue before the Ninth Circuit was the validity of a local ordinance that would have required AT&T to provide a pure transmission conduit to ISPs. The Ninth Circuit properly held that § 541(b)(3)(D) of the Communications Act prohibits and preempts any such requirement.[49] The appropriate regulatory classification of AT&T's existing cable Internet service to subscribers was not even before the court (far as noted, the parties to the litigation had *stipulated* that AT&T's cable modem service is a cable service). And the Ninth Circuit was clearly wrong insofar as it suggested in *dicta* that because the information service the cable operator sells to subscribers *uses* telecommunications, the cable operator is also offering a "telecommunications service." Indeed, the Ninth Circuit's apparent recognition that cable Internet services are information services forecloses any suggestion that those services are also telecommunications services. As the Commission has held, "the categories of 'telecommunications service' and 'information service' in the amended Communications Act are mutually exclusive."[50]

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[47] *See, e.g., California* v. *FCC*, 905 F.2d 1217, 1223, n.3 (9th Cir. 1990); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, 387, 420 (1980) ("*Computer II*").

[48] Subscribers to AT&T's cable modem services can "specify the ultimate points of communication on the Internet," NOI ¶ 18, in the sense that they are free to visit any site accessible over the public Internet, but that does not change the controlling fact that AT&T chooses how to package the service and selects other information to transmit to its subscribers. *See Broward County*, slip op. at 8-10 (S.D. Fla. Nov. 8, 2000).

[49] *See City of Portland*, 216 F.3d at 878.

[50] *Report to Congress*, 13 FCC Rcd. at 11520. As the NOI recognizes, the Ninth Circuit dicta was made "without specifically construing the language of the statutory definitions at issue." NOI ¶13, n.26.

The NOI asks whether "there is a telecommunications component of cable modem service or the cable modem platform that represents pure transmission capability."[51] There plainly is. *All* information services have a telecommunications component. Indeed, as noted, "information services" are statutorily defined as services that "mak[e] available information *via telecommunications*."[52] But there is a fundamental difference between using telecommunications and offering a telecommunications service. As the Commission has consistently held, an information service provider "uses telecommunications" but "does not offer telecommunications."[53] Thus, AT&T and other cable operators use telecommunications facilities – their cable wires[54] – as a component of cable Internet services that are both information services and cable services, but they do not provide telecommunications services in the process.[55]

It is equally well settled that cable Internet service providers cannot be regulated as Title II common carriers merely because their services, like the services of all other information service providers, have a telecommunications component. Title II applies only to "common carriers" or to "telecommunications carriers," which, as the Commission and the courts have

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[51] NOI ¶ 18.

[52] 47 U.S.C. § 153(20) (emphasis added).

[53] *Report to Congress*, 13 FCC Rcd. at 11520 (¶39).

[54] FCC Amicus Brief, at 18 ("No matter how cable modem service (or its transmission component) is categorized . . . [the forced access provision] plainly requires MediaOne to provide *facilities* used for telecommunications.") (emphasis in original).

[55] *See also id* at 3 ("[T]he FCC has distinguished between basic 'telecommunications' or 'transmission' services, on the one hand, and 'enhanced services' or 'information services' that are provided by means of telecommunications facilities").

held, are "essentially the same as common carrier[s]."[56] Thus, even firms that provide telecommunications facilities without accompanying information cannot be subject to Title II regulation unless they offer these pure transmission services generally to the public at large or to a subset of it.[57] By contrast, because they merely use telecommunications in their own information services or enhanced services, providers of cable Internet services do not provide telecommunications to third parties, either as a common carrier or a private carrier, and cannot be subject to Title II regulation.

In this regard, the implications would be truly staggering if the Commission could somehow "sever" "a telecommunications component from other" components of an information service and separately regulate the telecommunications component as a common carrier telecommunications service.[58] Under that approach, any provider of any cable service or other information service (including Lexis, Westlaw and all ISPs) would be required to act like a telephone common carrier and carry the services of anyone who so requested. For example, when cable operators provide CNN and when ISPs offers their services, they obtain programming from the producers of that programming and deliver it to customers over telecommunications facilities that they generally own (but sometimes lease). If mere use of that telecommunications component was enough to make cable operators and ISPs telecommunications carriers, they would be obliged to use their owned or leased facilities to carry the video programming or other information of anyone who sought carriage. The Commission and the courts have properly rejected claims that information service providers have

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[56] *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88 ("[T]he term 'telecommunications carrier' means essentially the same as common carrier" and "does not . . . introduce a new concept."), *aff'd Virgin Islands Tel. Co.* v. *FCC*, 198 F.3d 921 (D.C Cir. 1999). *See Southwestern Bell Tel. Co.* v. *FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) ("[T]itle II regulation . . . hinges upon the premise that the regulated entity is a common carrier.").

[57] *Virgin Islands Tel. Co.*, 198 F.3d at 927.

such common carrier obligations,[59] and, as noted, any such requirements in the cable context would also violate Title VI of the Communications Act and trigger heightened First Amendment scrutiny.[60]

E. The Regulatory Implications Of The Proper Classification Of Today's Cable Internet Services As Information Services And Cable Services Are Straightforward And Fully Consistent With The Commission's Market-Based Approach.

The NOI also asks commenters to address the regulatory "implications" of the fact that cable Internet services are properly classified as "information services" and "cable services," but not as "telecommunications services."[61] It asks for comments on the consequences of these classifications both for the authority of all regulatory bodies to impose unbundling, interconnection, and access obligations on providers of these services and for the jurisdiction of local franchising authorities to impose other forms of regulation.

The short answer is that the consequences of these classifications precisely mirror the Commission's established policies. In particular, the Commission has repeatedly found that the best means of promoting the broadest availability of advanced telecommunications capabilities over cable at the lowest cost is to rely on marketplace forces and not artificial "forced access" regulations.

By defining cable Internet services as "cable services" as well as "information services," Congress made the same determination. In particular, Congress adopted the definition of "cable

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[58] *See* NOI ¶ 18, 69; *see also id.* ¶ 23.

[59] *See, e.g., Report to Congress*, 13 FCC Rcd. at 11520 (¶¶ 39 & 44); *Computer III*, 104 F.C.C.2d at 1017-18; *Computer II*, 77 F.C.C.2d 384, ¶ 114; *Howard* v. *America Online, Inc.*, 208 F.3d 741, 752 (9th Cir. 2000) ("Plaintiffs have failed to show that AOL offers discrete basic services that should be regulated differently than its enhanced services").

[60] *See* 47 U.S.C. §§ 541(c), 544(f)(1); *County of Henrico*, 97 F. Supp. 2d at 715-16 (concluding that forced access to cable modem services violated Title VI); *County of Broward*, slip op. at 22-23 (applying heightened scrutiny to forced access requirements for cable modem services).

services" in order to define the services that cannot trigger the imposition of "common carriage" or related "requirements" under the prohibitions that §§ 621(c) and 644(f) impose on all local, state, and federal regulatory bodies.[62] Section 621(c) provides that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service,"[63] and § 624(f) provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."[64] As one federal court has held, these provisions bar the imposition of any access obligations other than the must-carry, leased access, and related obligations that are expressly imposed by §§ 611, 612, 614, and 615.[65]

Congress had compelling reasons to grant cable operators this regulatory immunity from access requirements for their online services. It understood that these requirements raise profound First Amendment issues.[66] It understood that cable operators have no captive customers and can succeed only if they provide customers with the capabilities that they want and need. Finally, Congress understood – as the Commission has since repeatedly found – that online services offered over cable systems would inherently be provided in competition with services offered over telephone networks and other media and that this competition will prove far more effective than any regulatory requirements.

Further, the same results would follow even if cable modem services were only an "information service" and not also a "cable service." As noted above, providers of information

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[61] *See, e.g.*, NOI ¶ 23.

[62] H.R. Rep. 98-934, at 41 (1984).

[63] 47 U.S.C. § 541(c).

[64] 47 U.S.C. § 544(f)(1).

[65] 47 U.S.C. §§ 531, 534-35. *See County of Henrico*, 97 F. Supp.2d at 714-16.

[66] *See Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 2458 (1994); *Broward County*, slip op. at 11-12.

services do not provide "telecommunications services" and cannot be subject to regulation under Title II of the Communications Act.

Nor could the Commission exercise its authority under Title I of the Communications Act to impose access regulations on providers of cable modem or other informations services.[67] In the Telecommunications Act of 1996, Congress specifically provided that a firm may be subject to the access and other requirements found in Title II "only to the extent that it is engaged in providing telecommunications service,"[68] and Congress adopted this prohibition for the express purpose of assuring that providers of information services could not be subject to these requirements.[69]

Beyond that, even if these express limitations in the 1996 Act did not exist, it is very clear that the Commission's Title I authority could not be exercised to impose forced access obligations on cable operators. In particular, the Commission has consistently refused to extend its ancillary Title I jurisdiction to products and services where, as here (*See* Part II, *infra*.)[70], there is no bottleneck power or related market failure. For example, the Commission rested its decision to detariff billing and collection services on its conclusion "that because there is sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices on the part of exchange carriers, no statutory purpose would be

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[67] *See* NOI ¶ 24.

[68] 47 U.S.C. § 153(44)

[69] See *Non-Accounting Safeguards*, 11 FCC Rcd 21,905, ¶102 (1996) (By codifying the definitions of information services, Congress "preserve[d] the definitional scheme under which the Commission exempted [these] services from Title II regulations.")

[70] (*See* Part II, *infra*.)

served by continuing to regulate billing and collection service for an indefinite period."[71] And in the *Computer II* decision, the Commission declined to exercise Title I authority over information service providers in light of its finding that "the market is truly competitive."[72] As the Commission explained, "[e]xpansion of regulation to cover or threaten to cover services and vendors that have not been regulated cannot be sustained in the absence of an overriding statutory purpose."[73] These conclusions apply with full force here, and it is well settled that conclusory allegations of supposed monopolistic threats are not remotely sufficient to justify extension of ancillary jurisdiction.[74]

Providers of cable Internet services are also not subject to the "interconnection" obligations of § 251(a) of the Communications Act. These obligations, too, apply only to "providers of telecommunications services." Indeed, § 251(a) would not avail proponents of forced access even if cable Internet service was a "telecommunications service." That provision requires a carrier only to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[75] The Commission has interpreted section 251(a) as requiring only "the linking of two networks for the mutual exchange of traffic" and not requiring one carrier to provide "transport and termination" of another's traffic.[76] By the very nature of cable Internet service, cable operators already provide the interconnection mandated by § 251(a).

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[71] *In the Matter of Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1170, ¶ 37 (1986). *See also In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 6 FCC Rcd. 3506, 3509, ¶ 25; *Detariffing of Billing and Collection Services*, 1 FCC Rcd. 445, ¶ 2 (1986).

[72] 77 F.C.C.2d at 433.

[73] *Id.* at 434.

[74] *In the Matter of Metro Communications, Inc.* v. *Ameritech Mobile Communications, Inc.*, 12 FCC Rcd. 13,083, 13090-91, ¶¶ 22-23 (1996).

[75] 47 U.S.C. § 251(a)(1).

[76] 47 C.F.R. § 51.5.

Cable Internet service subscribers have unrestricted access to the public Internet (and all of the networks that comprise and are connected to it), can send and receive traffic to and from any ISP, and can exchange e-mails with the customers of any ISP. Section 251(a) also cannot provide a basis to require cable operators to provide "open access" to unaffiliated ISPs because the duty of interconnection is limited only to "the facilities and equipment of other *telecommunications carriers*."[77] ISPs, of course, are not "telecommunications carriers."[78]

These same factors foreclose USTA's claim that providers of cable Internet services must contribute to the universal service fund. As USTA concedes, section 254(d) only requires an entity to contribute to the universal service fund "to the extent" that it provides "telecommunications services,"[79] and the Commission has held that providers of information service are not subject to § 254(d).[80]

Relatedly, the Commission also asks if cable Internet services and the cable modem platform are "advanced telecommunications services" and what implications that has for the Commission's authority to "forbear" from regulating these service. There is no doubt that cable Internet services and the cable modem platform are each an "advanced telecommunications capabilit[y]" within the meaning of section 706 of the 1996 Act. Congress defined the term "advanced telecommunications capability" as "high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice,

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[77] 47 U.S.C. § 251(a)(1).

[78] *Howard* v. *America Online, Inc.*, 208 F.3d 741, 753 (9th Cir. 2000) (citing *Report to Congress*, 13 FCC Rcd. 11501, 11529 (1998)).

[79] United States Telecom Association, Petition For Declaratory Ruling, *In the Matter of Universal Service Contribution Obligations Of Cable Operators That Provide Telecommunications Services* (filed Sept. 26, 2000), at 7.

[80] *Report to Congress*, 13 FCC Rcd. at 11534.

data, graphics and video telecommunications using *any* technology."[81] In its *Second Enhanced Services Report*, the Commission determined that "infrastructure capable of delivering a speed in excess of 200 kbps in each direction" qualifies as an "advanced service capability" within the meaning of section 706.[82] The cable modem platform and cable Internet services clearly satisfy that threshold.[83]

However, although these services are "advanced services capabilit[ies]," cable modem services are not "telecommunications services" and the cable operators that provide these services are not "telecommunuications carriers," for the reasons explained above. Because § 10 of the Communications Act grants Act the Commission authority to forbear from applying "any provision of this Act to a telecommunications carrier or telecommunications service,"[84] cable modem services are not subject to the provisions of the Communications Act to which the Commission's forbearance authority applies. At the same time, *if* cable modem services were somehow deemed to be subject to these provisions, these would epitomize the services over which the Commission should forbear from applying its regulations. Competition will fully assure that rates are "just and reasonable" and that the services are provided free of "unreasonable discrimination."

The NOI also seeks comment on the implication of classifying cable modem service as a "cable service" for the regulatory authority of local franchising authorities.[85] To the extent the Communications Act grants local franchising authorities the authority to regulate "cable

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[81] 47 U.S.C. § 157 Note(c)(1) (emphasis added).

[82] Second Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, FCC 00-290, 2000 WL 1199533, ¶ 8 (August 21, 2000) ("*Second Enhanced Services Report*").

[83] *See id.* at ¶ 29.

[84] 47 U.S.C. § 160(a).

services," they would also have the authority to regulate cable Internet services.[86] Thus, taking the example provided in paragraph 17 of the NOI, local franchising agencies would have the authority under section 622 of the Communications Act to charge a franchise fee on cable operators' gross revenues, including their cable Internet services.[87] In fact, AT&T currently pays franchising fees assessed on revenues from its cable Internet services.[88]

At the same time, the provisions of the Communications Act impose other explicit constraints on the regulatory powers that local franchising authorities could exercise over these cable services. First, with the exception of the Portland District Court that was reversed by the Ninth Circuit, each court to address the issue has held that open access obligations imposed by local franchising authorities on cable operators violate section 621 of the Communications Act because they "requir[e] a cable operator to provide a[] telecommunications . . . facility."[89] In addition, local franchising authorities are precluded from regulating in any manner "a cable system's use of any type of subscriber equipment or any transmission technology."[90] The courts have found that this provision, too, prohibits local franchising authorities from imposing "open

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[85] *See* NOI ¶ 17.

[86] Of course, provisions applicable only to video programming, basic cable services, and cable programming services (*e.g.*, 47 U.S.C. §§ 531, 532, 534, 535) could not be invoked to regulate cable modem services.

[87] *See also* 47 U.S.C. §§ 551(g) (permitting local authorities to enact laws consistent with the Communications Act to protect cable subscriber privacy), 552(a) (permitting local authorities to enforce consumer protection and customer service requirements consistent with the Communications Act).

[88] In response to the Ninth Circuit decision, some local franchising authorities have waived fees associated with cable Internet service (*e.g.*, Kern County, CA) or have required that they be put in trust (*e.g.*, Los Angeles, CA) pending the Commission's determination.

[89] 47 U.S.C. § 541(b)(3)(D); *Gulf Power*, 208 F.3d. at 878-79; *County of Henrico*, 97 F. Supp. 2d at 714.

[90] 47 U.S.C. § 544(e).

access" on cable operators.[91] Further, local rate regulation of cable modem services is precluded by section 623 of the Communications Act.[92]

Finally, in addition to the provisions of the Communications Act, any regulations that single out cable operators for special obligations trigger heightened scrutiny under the First Amendment. In this regard, when one court did not reach the merits of the Communications Act's prohibitions on these exercises of local franchising authority, it held that the local forced access obligation violated the First Amendment under both strict and intermediate scrutiny.[93]

F. The Existing Legal Framework Will Allow The Commission To Determine The Appropriate Regulatory Classifications Of Future Cable Internet Services Once The Relevant Terms And Characteristics Of Those Future Services Are Established.

Although the regulatory classification of existing cable modem services is straightforward, the Commission obviously cannot, in this proceeding, definitively classify future cable Internet services. As explained above, under the statutory framework established by Congress, the regulatory classification of a service turns on the relevant characteristics of that service, including whether the service transmits information of the service provider's choosing and the nature of the arrangements between the service provider and customers. In particular, it would be inappropriate to speculate about the regulatory nature of the future services that AT&T and other cable operators will provide to ISPs. The technical and operational trials, commercial negotiations, and business planning that are necessary to determine how these services should be designed and provisioned to best serve consumers are underway but are not yet complete, and it is therefore premature to attempt to label them now. Whether new services provided to ISPs (or

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[91] *County of Henrico*, 97 F. Supp. 2d at 715.

[92] 47 U.S.C. § 543.

[93] *See Broward County*, slip op. at 15-18, 24, 26.

end users) are information services, cable services, or telecommunications services will depend upon characteristics of those services that are not yet known.

In order to avoid a repeat of the past several years of massive and extremely costly confusion in the courts and in state and local commissions, the Commission should, however, clarify that the existing statutory framework must be used to classify new services once they are deployed. First, the Commission should reaffirm that any future service provided to ISPs that includes information of the cable operator's choosing will, by definition, be an information service. As discussed above, telecommunications services provide the bare transmission of information that the customer provides without altering that information. So long as a cable Internet service provides an unaffiliated ISP and its customers with something more than bare transmission over the cable modem platform, that service will therefore be an information service.

In this regard, it has long been recognized that the "information service" designation is not affected by the nature or quantum of the information supplied. The MFJ courts repeatedly held, for example, that bare-bones "gateway services" provided by the BOCs were "information services" (and upheld a waiver of the decree to permit the BOCs to provide these information services).[94] These gateway services allowed voice telephone customers to dial a local telephone number and reach a "welcome page."[95] The welcome page merely displayed a list of the various information services that could be accessed by the subscriber and the billing arrangements that

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[94] *See United States* v. *Western Elec.*, 673 F. Supp. 525, 587-97 (D.D.C. 1987), *aff'd in part & rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990); *United States* v. *Western Elec.*, 1989 WL 21992, *1 (D.D.C. 1989), *aff'd*, 907 F.2d 160 (D.C. Cir. 1990); *United States* v. *Western Elec.*, 907 F.2d 160, 161-62 & n.1 (D.C. Cir. 1990). Like the Act, the MFJ defined an information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." *United States* v. *AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982), *judgment aff'd by Maryland* v. *United States*, 460 U.S. 1001, 103 S. Ct. 1240 (1983).

[95] *Western Elec.*, 673 F. Supp. at 595.

would apply.[96] Once the subscriber selected a particular information service, "all information content, as well as information storage, indexing, retrieval and presentation" were provided by the information provider and not the BOC.[97] It is well established that Congress is presumed to legislate against the established regulatory backdrop and, thus, adopted the existing meaning of enhanced/information services.[98]

Second, if future services are structured such that a cable operator provides bare telecommunications to selected ISPs under individually negotiated terms and conditions, the service provided would be private carriage. The cable operator would thus be neither a common carrier service subject to Title II regulation nor a "telecommunications carrier" is subject to these regulations to the extent that it provides a "telecommunications service." A common carrier is an entity "engaged in rendering communication service for hire to the public."[99] As the D.C. Circuit has explained, "[t]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently."[100] Thus, to be a common carrier, a carrier must "hold[] himself out to serve indifferently all potential users."[101] In contrast, an entity that "make[s] individualized decisions, in particular cases,

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[96] *Id.* The court recognized that the way in which information providers were listed on the welcoming page was a matter of "editorial control" and "closely interrelated with information content." *Id.*

[97] *Id.* at 587-88, 592.

[98] *See United States* v. *Hill*, 506 U.S. 546, 553-54 (1993); *see also* H.R. Conf. Rep. 104-458 at 115-16.

[99] 47 C.F.R. § 21.2; *see also* 47 U.S.C. § 153(10).

[100] *Southwestern Bell Tel. Co.* v. *FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (quoting *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976)).

[101] *Id.* (citation omitted).

whether and on what terms to deal" undertakes private carriage.[102] Finally, the Commission and the D.C. Circuit have held that firms that provide telecommunications as private carriers are not providing "telecommunications services" within the meaning of the Communications Act.[103]

The *Southwestern Bell* case is particularly instructive. There, incumbent LECs offered "dark fiber" service "on an individualized case basis where each service contract was negotiated separately and specifically tailored to the particular needs of each customer."[104] The Commission held that individualized pricing was discriminatory and in violation of section 202 of the Communications Act. The court reversed, reasoning that the Commission could not regulate the dark fiber offering under Title II of the Communications Act because the dark fiber offering was a "limited, customer-specified service" and, therefore, was not provided "on a common carrier basis."[105] The court emphasized that the Commission has recognized that "service arrangements that meet the needs of specific customers" are private carriage, not common carriage.[106]

Finally, even if any future cable Internet service satisfied the definition of "telecommunications service" and cable operators were deemed to be "carriers" for some purposes, these future services should still not be subject to unbundling obligations, such as those

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[102] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 (1979). *See generally Cable & Wireless*, 12 FCC Rcd. 8516, ¶ 12 (1997) ("[T]he courts have held that the indiscriminate offering of a service to the public is an essential element of common carriage").

[103] *Virgin Islands Tel.*, 198 F.3d at 927.

[104] *Southwestern Bell*, 19 F.3d at 1477.

[105] *Id.* at 1480-81. The court also noted that "[t]he mere fact that petitioners are common carriers with respect to some forms of telecommunications does not relieve the Commission from supporting its conclusion" with regard to the particular service at issue. *Id.* at 1481.

[106] *Id.* at 1482 (quoting *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, ¶ 193 (1990)). *See also AT&T Submarine Sys., Inc*, 13 FCC Rcd. 21585 at ¶ 8 (individualized sale of submarine cable capacity "at market prices" is private carriage), *Domestic Fixed-Satellite Transponder Sales*, 90 FCC.2d 1238, 1252-53 (1982), *aff'd sub nom Wold*

imposed by the *Computer II* rules. As demonstrated below, cable Internet providers face vigorous competition from numerous competing providers of last-mile transport and Internet access services, and thus have no market power in any relevant market. Even if the existing *Computer II* rules impose unbundling obligations on carriers that lack market power, they were adopted at a time (1980) when virtually all facilities-based common carriers were dominant carriers who possessed market power.[107] But "a supplier in a competitive market cannot force undesirable bundles of services and equipment on purchasers who can turn to other bundles or to stand-alone offerings."[108] For that reason, the Commission is considering in a pending proceeding, exempting nondominant carriers from the *Computer II* requirements that they separately offer enhanced services and basic telecommunications services.[109] For the same reason, it would be arbitrary to apply *Computer II*'s unbundling requirements to future cable Internet services – even if cable operators were deemed to be carriers for some purposes.

II. THE COMMISSION'S LONGSTANDING POLICY OF "VIGILANT RESTRAINT" WITH RESPECT TO CABLE INTERNET SERVICES HAS ENORMOUSLY BENEFITED CONSUMERS, AND THERE IS NO RATIONAL BASIS TO SUPPLANT THIS MARKET-BASED APPROACH WITH REGULATION.

Four times in the past two years the Commission has evaluated broadband deployment and competition, and four times it has concluded that the market is working. Four times the Commission has analyzed whether government regulation of the terms of access to cable systems

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Communications, Inc. v. *FCC*, 735 F.2d 1465 (D.C. Cir. 1984) (individually negotiated lease of satellite transponders is private carriage).

[107] *Computer II*, 77 F.C.C.2d at 475.

[108] Ex Parte Declaration of Janusz A. Ordover and Robert D. Willig On Behalf of AT&T Corp., ¶ 55, *Policy and Rules Concerning the Interstate and Interexchange Marketplace*, CC Docket No. 96-61 (filed June 21, 2000).

[109] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Further Notice of Proposed Rulemaking, 13 FCC Rcd. 21531, 21551, ¶ 37 (1998).